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Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1992

LYNWOOD MOREAU, ET AL.,

*Petitioners,*

v.

JOHNNY KLEVENHAGEN, ET AL.,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit

**BRIEF OF THE STATE OF MISSOURI AS  
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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**BRIEF OF THE STATE OF MISSOURI AS  
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The State of Missouri, by its Attorney General William L. Webster, submits this amicus curiae brief in support of respondents.

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**INTEREST OF THE AMICUS CURIAE**

The Honorable William L. Webster, Attorney General for the State of Missouri, is currently involved in the defense of *Heaton v. Moore*, Case No. 91-0638-CV-W-2, an action pending in the United States District Court for the Western District of Missouri. Plaintiffs in *Heaton*, who are

employees of the Missouri Department of Corrections, allege that the defendant Missouri state officials violated Section 7(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(o) (1985), by failing to reach an agreement with employee representatives before providing compensatory time off in lieu of wages for overtime hours worked. The *Heaton* defendants have argued that they properly provided employees with compensatory time off because Missouri law precludes an agreement under subsection (i) of § 7(o)(2)(A), and because defendants have satisfied the individual agreement or understanding requirement under subsection (ii) of that section.

Because the facts of *Heaton v. Moore* closely mirror the facts in the present case,<sup>1</sup> and because the Court may find a comparison of the Missouri statutory scheme helpful in determining the scope and effect of its opinion in the present case, the State of Missouri submits this amicus curiae brief pursuant to Rule 37.5.

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### SUMMARY OF THE ARGUMENT

The statutory language of the Fair Labor Standards Act at issue in this case is unambiguous. It permits state

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<sup>1</sup> In both cases, (1) the public employees had designated a representative, (2) state law prohibited the public agency from entering into a collective bargaining or similarly enforceable agreement with the representative, and (3) the public agency, without an agreement with the employees' representative, had established a pay system providing for compensatory time. See *Moreau v. Klevenhagen*, 956 F.2d 516, 519 (5th Cir. 1992), cert. granted, 113 S. Ct. 51 (1992).

agencies to enter into agreements regarding compensatory time with individual employees when there is no agreement between the agency and the employees' designated representative. When the terms of the statute are unambiguous, there is no need to engage, as petitioners do, in an extensive analysis of the legislative intent behind the statute.

Even if, as petitioners themselves maintain, the statutory language is ambiguous in some respect, petitioners' argument still fails. The State of Texas, like the amicus State of Missouri, has determined as a matter of fundamental public policy that it will not enter into collective bargaining or other agreements with unions representing state employees. Under the "plain statement" rule applied in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), any intent by Congress to interfere in this area of sovereign authority cannot be ambiguous, but must be unmistakably plain.

### ARGUMENT

- I. THE LANGUAGE OF THE FAIR LABOR STANDARDS ACT UNAMBIGUOUSLY PROVIDES THAT, IN THE ABSENCE OF AN AGREEMENT BETWEEN A PUBLIC AGENCY AND A UNION REPRESENTING PUBLIC EMPLOYEES, THE PUBLIC AGENCY IS FREE TO REACH AGREEMENTS WITH INDIVIDUAL EMPLOYEES REGARDING COMPENSATORY TIME.

The issue in the present case is whether a state that has not reached an agreement with a union representing state employees may nevertheless reach agreements or

understandings regarding compensatory time with individual employees under subclause (ii) of § 7(o)(2)(A) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(o)(2)(A)(ii). The unambiguous language of the statute establishes that a state may reach such individual agreements.

The 1985 Amendments to the FLSA were passed in response to the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which made state and local government employers subject to the FLSA. Section 7(o) of the Act as amended offered these government employers the opportunity to become exempt from the normal FLSA requirement of paying cash for overtime. Section 7(o) provides in relevant part:

- (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
- (2) A public agency may provide compensatory time under paragraph (1) only –
  - (A) pursuant to –
    - (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

- (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . .

29 U.S.C. § 207(o).

Public agencies thus have two methods of providing compensatory time in lieu of the usual FLSA requirement of paying cash for overtime. Under subclause (i) of § 7(o)(2)(A), they may enter into agreements with unions that represent state employees. Under subclause (ii) of that section, they may enter into individual agreements with employees "not covered by" subclause (i) of § 7(o)(2)(A). Contrary to petitioners' implication, the language of subclause (ii) does not permit individual agreements only when state employees are "not covered by" a union; the plain language instead says "not covered by subclause (i)." Because subclause (i) requires not only union representation, but also some *agreement* between the State agency and the union, the absence of such an agreement must mean that the union's employees are "not covered by subclause (i)." Subclause (ii) should accordingly be available to a State agency as a method of avoiding cash overtime whenever an agreement has not been reached between a State employer and a union.

The Fifth Circuit Court of Appeals adopted this analysis in its decision below. It correctly concluded that "the plain language of § 207(o)(2)(A) mandated an agreement between a public agency and an employee representative in order to subject an agency to subclause (i)." *Moreau v. Klevenhagen*, 956 F.2d 516, 519 (5th Cir. 1992). This holding

was in accord with the decisions of other Circuits, most notably the Eleventh Circuit in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990).

If, as seems apparent, the statutory language at issue is clear on its face, the legislative history and the enforcing regulations are largely irrelevant. "Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *United States v. James*, 478 U.S. 597, 606 (1986) and *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where, as here, a statute is unambiguous on its face, the Court will look to the legislative history only to confirm that there is no "clearly expressed legislative intent" to the contrary. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

In the present case there is no "clearly expressed legislative intent" that could possibly override the clear language of the statute. Although some support can be found in the legislative history for petitioners' position, that support is not as clear, or certainly as consistent, as petitioners would have it. Nearly every appellate decision interpreting the relevant legislative history and related Department of Labor regulations and commentary has concluded, to varying degrees, that this history fails to provide consistent guidance. *See Abbott v. City of Virginia Beach*, 879 F.2d 132, 135 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990) (legislative history contradictory; administrative commentary confusing); *Dillard v. Harris*, 855 F.2d at 1553-54 (legislative history revealed "no single

intent," "no stated consensus," and "no clear answer to what effect the presence or absence of a 'representative' would have on whether employees are 'not covered by' § 207(o)(2)(A)(i)");<sup>2</sup> *Abbott*, 879 F.2d at 135-36 (noting conflict between the regulations implementing the FLSA Amendments and the accompanying "Discussion of Major Comments" issued by the Secretary of Labor, *see Application of the Fair Labor Standards Act to Employees of State and Local Government*, 52 Fed. Reg. 2012, 2014-15 (Dep't Labor 1987)).<sup>3</sup>

Even cases and circuits on which petitioners rely suggest that the legislative history is far from conclusive. In *Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814, 819-820 (10th Cir. 1989), the Tenth Circuit observed that the Department of Labor regulations do not square with the Senate Committee Report on the issue of

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<sup>2</sup> The *Dillard* court noted that the Senate Committee Report referred to "recognized representatives," while the House Report referred to "representatives designated by the employees." S. Rep. No. 159, 99th Cong., 1st Sess. 10-11 (1985); H.R. Rep. No. 331, 99th Cong., 1st Sess. 17-18 (1985). The House and Senate Committee Reports contain no explanation or resolution of this difference, nor does the report of the joint conference committee. *Dillard*, 855 F.2d at 1554.

<sup>3</sup> While the regulations provide that "in the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees," 29 C.F.R. § 553-23(b)(1) (1987), the Secretary of Labor's comments state that "it is the Department's intention that the question of whether employees have a representative for purposes of FLSA § [207(o)] shall be determined in accordance with state and local law practices." *See Wilson v. City of Charlotte*, 964 F.2d 1391, 1395-96 (4th Cir. 1992).

whether employees having a designated representative are deemed to be "represented," even if the employer failed to recognize the representative. In *SNEA v. Bryan*, 916 F.2d 1384, 1388 (9th Cir. 1990), the Ninth Circuit, which authored two opinions relied on by petitioners, agreed with the Fourth Circuit in *Abbott* that "the House and Senate Reports offer different views of the meaning of § 207(o)."

Because the language of the FLSA unambiguously permits it, and because the legislative and administrative histories of the Act provide no clearly expressed contrary intent, respondents here should be free to reach agreements with individual state employees regarding the use of compensatory time under subclause (ii) of FLSA § 7(o)(2)(A).

**II. EVEN IF, AS PETITIONERS CONTEND, THE RELEVANT LANGUAGE OF THE FAIR LABOR STANDARDS ACT IS AMBIGUOUS IN SOME RESPECT, THE STATUTE MUST BE READ TO ALLOW A STATE AGENCY TO REACH AGREEMENTS WITH INDIVIDUAL EMPLOYEES ON COMPENSATORY TIME UNDER THE "PLAIN STATEMENT" RULE OF STATUTORY INTERPRETATION WHERE, AS HERE, STATE LAW FORBIDS AN AGREEMENT WITH THE EMPLOYEES' UNION.**

Even if the language of section 7(o)(2) is, as petitioners contend, ambiguous, petitioners are not helped. Under the plain statement rule applied in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), any such ambiguity would be fatal to petitioners' reading of the statute.

Petitioners concede that section 7(o)(2)(A) is ambiguous:

[E]xactly which classes of employees are "covered by subclause (i)" and which are "not covered" is not explicitly stated in the statutory text. As the Tenth Circuit explained, "it is unclear whether ["employees not covered by subclause (i)"] means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. *Local 2203 v. West Adams Co. Fire Dist.*, 877 F.2d 814, 816-17 (10th Cir. 1989). Given this ambiguity, and given Congress' action in charging the Department of Labor with the authority to administer the FLSA, the proper starting point in clarifying the meaning of § 7(o)(2)(A) is the Department's interpretation of that provision.

Petitioners' Brief at 10 (emphasis added).

Contrary to petitioners' premise, if the statutory language here is ambiguous, it is the *end*, not the beginning, of the inquiry. Petitioners' reading of the statute would require respondents, Missouri, and other similarly situated States to reach agreements with state employees' unions in order to use compensatory time, even though these States, like Texas in the instant case, *forbid* such agreements as a matter of state policy.<sup>4</sup> Because

<sup>4</sup> Texas law "prohibits any political subdivision from entering into a collective bargaining agreement with a labor organization unless the political subdivision has adopted the Fire and Police Employee Relations Act." *Moreau*, 956 F.2d at 519. Because the political subdivision did not adopt the Employee Relations Act in the present case, the county had no authority to

petitioners' reading of the statute would interfere with fundamental state policy, that reading can stand only if the language of the statute is "unmistakably clear." *Gregory v. Ashcroft*, 111 S. Ct. at 2401 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Here, by petitioners' own admission, the language is ambiguous rather than clear.

The Court in *Gregory* recognized that under the Supremacy Clause, U.S. Const. art. VI, "Congress may impose its will on the States" as long as it acts under powers granted by the Constitution. 111 S. Ct. at 2400. Because of the "extraordinary nature" of this power, however, the Court assumed that Congress would not exercise it lightly. *Id.* Thus, when a congressional enactment would interfere with fundamental decisions of states acting as sovereigns, and thereby "upset the usual constitutional balance of federal and state powers," the intent of Congress to interfere must be plain. As the Court noted

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bargain with the union. *Id.* Although Missouri law allows State agencies to recognize a union as the exclusive bargaining representative of their employees, it specifically bars the State from negotiating enforceable collective bargaining agreements. Mo. Rev. Stat. § 105.500-.520 (1983). Missouri specifically limits the extent of discussions over wages and working conditions, precludes public employers from formally adopting, modifying or rejecting proposals from a labor organization, and allows a state public employer simply to "meet, confer and discuss" only those proposals that first come from a recognized labor organization. *Id.* § 105.520. Thus Missouri, like Texas here, prohibits its agencies from reaching any binding "agreement" with any labor organization within the meaning of subsection (i) of § 7(o)(2)(A). See *Null v. City of Grandview*, 669 S.W.2d 78, 80 (Mo. Ct. App. 1984).

in *Gregory*, quoting its earlier decision in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989):

[I]f Congress intends to alter the "usual constitutional balance between the States and Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); see also *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

111 S. Ct. at 2401. The *Gregory* Court then stated:

This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

*Id.*

Although *Atascadero* and *Will* were Eleventh Amendment cases, the Court in *Gregory* extended the plain statement rule to areas protected by the Tenth Amendment. The Court expressly recognized the authority of the State of Missouri to set a mandatory retirement age for its judges:

It is an authority that lies at "the heart of representative government." It is a power reserved to the States under the Tenth Amendment and

guaranteed them by that provision of the Constitution under which the United States guarantees to every State in this Union a Republican Form of Government. U.S. Const. art. IV, § 4.

111 S. Ct. at 2402 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)). The Court in *Gregory* accordingly refused to apply the Age Discrimination in Employment Act to invalidate Missouri's chosen retirement age for its judges because the Act contained no plain statement of congressional intent to do so:

In the face of such ambiguity, we will not attribute to Congress an intent to intrude on the State governmental functions regardless of whether Congress acted pursuant to its commerce clause powers or § 5 of the Fourteenth Amendment.

111 S. Ct. at 2395.

The present case is no different. A state's determination of how, and on what terms, it will engage in collective bargaining or otherwise reach agreements with unions representing its employees is at the very heart of a state's sovereign authority.<sup>5</sup> It is no answer to say, as

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<sup>5</sup> Petitioners suggest that Texas may not have a strong public policy against all dealings between public employers and unions. They argue that while Texas public employers are admittedly precluded from entering into collective bargaining agreements with unions, under Texas law such employers may still enter into other "less formal" and "less binding" relationships with unions as representatives of their employees. Petitioners' Brief at 26. Even if this were an accurate statement of Texas law, it cannot condone any congressional interference in the relationship between Texas and its public employees absent the clearest statement of such intent in the FLSA. This is even

petitioners do, Petitioners' Brief at 32, that states simply have a *choice* under the FLSA "either to pay overtime compensation to represented employees or to reach an agreement with the employees' representative authorizing the use of compensatory time." States cannot be so easily deprived of their Tenth Amendment right to regulate their own governmental functions.<sup>6</sup> Because a state's handling of its relations with its own public employees is uniquely within its sovereign power, Congress must make unmistakably plain any intent to regulate a state's conduct in this area. Congress has failed to do this in the FLSA.

Petitioners' reading of section 7(o)(A)(2) of the Act would allow Congress to regulate in an area traditionally

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more true with respect to states such as Missouri, which do not even allow public employers to initiate *discussions* regarding wages, hours, and working conditions with employee representatives. In Missouri, for example, public employers may only "meet, confer and discuss" union proposals, and then only if those proposals are first initiated and presented by the union. Mo. Rev. Stat. § 105.520 (1983).

<sup>6</sup> This exact issue was addressed in *Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814 (10th Cir. 1989), a case on which petitioners place principal reliance on another point. In rejecting the plaintiff's argument that it need not reach the Tenth Amendment question, the *West Adams* court stated:

If the decision to engage in collective bargaining is protected from federal influence by the tenth amendment, the [defendant] is correct that it should be free to choose its own course regarding collective bargaining, without Congress enticing it down a certain path with the carrot of compensatory time.

877 F.2d at 820 n.7

reserved to the states under our federal system. Respondents' reading does not. Because petitioners concede that section 7(o)(A)(2) is ambiguous, and merely argue that their interpretation is the more plausible one, it is self-evident that Congress has not expressed its intent to regulate the states' dealings with their own employees' unions in the "unmistakably clear" language required by *Gregory v. Ashcroft*.

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### CONCLUSION

The decision of the Fifth Circuit should be affirmed.

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